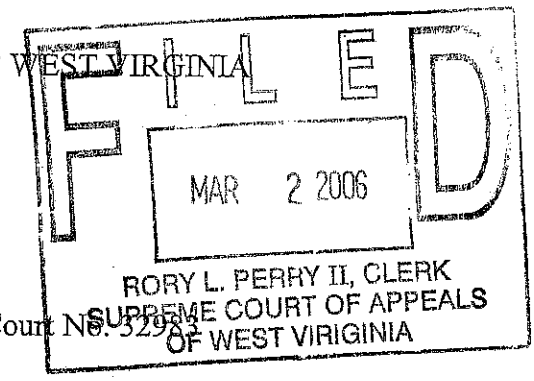
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA EX REL.
JOHN MCLAURIN,
Appellant,

Supreme Court No. 32983

v.

Circuit Court No. 00-MISC-16
(Kanawha)

THOMAS MCBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
Appellee.

APPELLANT'S BRIEF

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In habeas corpus proceedings in the Kanawha County Circuit Court, appellant John McLaurin (McLaurin) raised a number of constitutional challenges to his 1989 convictions and lengthy, consecutive sentences for first-degree sexual assault (7 counts) and kidnapping (2 counts) in that court.[1] On this appeal, McLaurin raises five claims that were denied by the circuit court in its July 11, 2005, Opinion Order.

First, McLaurin was denied due process by the trial court's refusal to grant him a psychiatric evaluation to determine his competency to stand trial and criminal responsibility. In denying this habeas claim, the circuit court only addressed the refusal to order a psychiatric exam to determine criminal responsibility. The court failed to address McLaurin's claim regarding the refusal to order a competency evaluation and failed to make the required findings of fact and conclusions of law. In addition, the circuit court should have granted this claim as McLaurin's trial counsel presented substantial reasons to the trial court before trial why McLaurin may not be competent to stand trial. Counsel said he believed McLaurin was psychiatrically impaired and that he had major issues with McLaurin's ability to understand the proceedings and cooperate in his defense. Counsel further represented that McLaurin's prison records showed he suffers from organic brain damage or psychiatric incapacity. These records were introduced at

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[1] McLaurin's direct appeal to this Court was refused 4-1 (Miller, J.) on February 5, 1991. See Case No. 901457. In a previous habeas proceeding, which only addressed issues relating to Fred Zain's testimony, see In Re An Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 438 S.E.2d 501 (1993), the Kanawha County Circuit Court vacated McLaurin's convictions and sentences for two of the counts of first-degree sexual assault and one count of kidnapping. This judgment was affirmed on appeal. See State ex rel. McLaurin v. Trent, 203 W.Va. 67, 506 S.E.2d 322 (1998). McLaurin began the instant habeas proceedings by filing a *pro se* petition on January 14, 2000. McLaurin's initial habeas petition was summarily dismissed by the trial court on December 23, 1991. See Case No. 91-W-28.

the habeas evidentiary hearing along with trial counsel Steven Miller's testimony that he believed McLaurin was incompetent to stand trial.

Secondly, McLaurin claimed he was denied a fair trial by the trial court's refusal to sever for trial the three unrelated sexual assault incidents involving C.C., J.T., and B.S.[2] This case is a classic example of the State's improper joinder of three unrelated sexual assault incidents so the identification in one case (B.S.) could bolster the victims' failure to identify their assailants in the other two cases (C.C. and J.T.). The habeas court upheld the trial court's refusal to sever these offenses for trial on the ground that the offenses showed a common scheme or plan. The lower court erred as there was nothing so unique or distinctive about these three unrelated incidents to constitute "signature" evidence that meets this Court's legal definition of common scheme, plan, or design. For example, J.T. was assaulted in a downtown Charleston hotel where she worked as a maid by a man with an ice pick while B.S. was kidnapped from a Montgomery parking lot by a man with a gun, driven to an isolated Kanawha County location, made to hike into the woods, forced to swallow pills, and sexually assaulted. In addition, the subsequent vacation in McLaurin's previous habeas case, see footnote 1, of his convictions and sentences for the C.C. kidnapping and sexual assaults on grounds of insufficient evidence demonstrates there was actually no significant evidence from that incident linking him to those crimes or the others.

The error in refusing to sever these three incidents for trial was further compounded by the trial court's refusal to give a limiting instruction regarding the jury's use of collateral crimes evidence. The jury was not told that in deciding McLaurin's guilt as to each offense it could not consider evidence of the other incidents as proof of guilt, but only as to whether it showed a common scheme, plan, or design. The habeas court denied this claim, finding that defense

[2] The victims' names have been abbreviated with their initials to be consistent with the habeas court's Opinion Order.

counsel's requested instruction was not a correct statement of the law; and even if the court erred in not giving a corrected instruction, it was not a basis for habeas corpus relief. The circuit court erred as the trial court had a duty to give a cautionary instruction and its failure to do so denied McLaurin his due process right to a fair trial.

McLaurin's fourth claim is that his convictions and sentences for two counts of first-degree sexual assault on J.T. by sexual intercourse constitute the same offense and therefore violate state and federal double jeopardy prohibitions. The habeas court denied this claim, citing State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989). The habeas court erred as J.T.'s testimony indicates there was no elapsed time between the two acts of sexual intercourse by her assailant which Woodall requires for separate offenses.

McLaurin's final claim of error is that he was constructively denied his right to counsel and the effective assistance of counsel because his trial attorneys failed to say anything or present any mitigating evidence on his behalf at sentencing. Like the first issue above, the habeas court failed to address this issue and make the required findings of fact and conclusions of law.

The habeas court did grant McLaurin relief on one constitutional claim, vacating his kidnapping conviction (involving B.S.) and life without mercy sentence and granting a new trial. The habeas court denied the remainder of McLaurin's claims and upheld his five convictions for first-degree sexual assault and the trial court's five consecutive 15-25 sentences, totaling 75-125 years, which McLaurin received at the conclusion of his jury trial on November 24, 1989.

STATEMENT OF FACTS

After McLaurin's arraignment, the trial court, at defense counsel's request, ordered a psychiatric examination to determine his competency to stand trial. See Order, filed June 2, 1989. However, because McLaurin and counsel disagreed over the use of a psychiatric defense, the examination did not occur. (November 7, 1989, Transcript of Pretrial Motion Hearing (11/7/89 Tr.) 3). After obtaining McLaurin's prison mental health records, defense counsel, shortly before trial, persuaded McLaurin an examination was necessary and McLaurin agreed to it.

On November 2, 1989, defense counsel filed a motion to continue the November 13, 1989, trial so McLaurin could obtain a psychiatric examination to determine his competency to stand trial and criminal responsibility. At the November 7, 1989, hearing on this motion, counsel told the trial court that he believed McLaurin is "psychiatrically impaired" (11/7/89 Tr. 12), and that there are "major issues of psychiatric capacity" relating to McLaurin's capacity to understand the consequences of his actions, the nature of the proceedings, and to cooperate in his defense. (11/7/89 Tr. 2). Counsel further stated that McLaurin's prison records indicated that he suffers from organic brain damage and that an appropriate expert would conclude "McLaurin is psychiatrically impaired and was probably not responsible for his actions and . . . may not be able to cooperate effectively with his counsel. . ." (11/7/89 Tr. 8). Counsel requested a thirty (30) day continuance to obtain these psychiatric evaluations. (11/7/89 Tr. 4).

The trial court denied defense counsel's request for a psychiatric examination and a continuance, concluding there was no good cause to grant it as it was not made within a reasonable time prior to trial. (11/7/89 Tr. 19). The trial court further found that McLaurin was competent to cooperate with his attorneys and assist them with his defense. (11/7/89 Tr. 19).

At the habeas evidentiary hearing, McLaurin's prison mental health records were admitted. See Petitioner's Exhibit 2. These records, specifically a 1975 psychological evaluation, indicated McLaurin took a Bender Visual Motor Gestalt test which showed perceptual difficulties often associated with brain damage. (April 25, 2003, Transcript of Omnibus Habeas Corpus Hearing, Volume III (4/25/03 Tr.) 51). This evaluation further indicated McLaurin likely experiences severe emotional difficulties and occasional psychotic episodes during which he is capable of grossly misinterpreting the actions of those around him. Id. The records also stated that a psychological evaluation update was done on November 20, 1987, which indicated there was no gross psychopathology present as in previous testing.

Trial counsel Steven Miller testified at the habeas evidentiary hearing that he believed McLaurin was incompetent to stand trial, he supported this belief with prison psychological records, and believed McLaurin should have been further evaluated before he proceeded to trial. (4/25/03 Tr. 133-34). Mr. Miller further stated that he believed McLaurin was incompetent to stand trial because of the difficulty he had communicating with McLaurin and obtaining his cooperation. (Tr. 4/25/03 Tr. 135).

The habeas court below denied McLaurin's claim that he was denied due process by the trial court's refusal to order a psychiatric examination to determine his competency to stand trial and criminal responsibility. However, the habeas court only addressed the trial court's refusal to provide a criminal responsibility examination, concluding "there is no likelihood that [McLaurin] could have developed a psychiatric disability that would have altered the jury's verdict." Opinion Order, at 13. The habeas court did not address McLaurin's claim that he was improperly denied a psychiatric examination to determine his competency to stand trial; and did not make the required findings of fact and conclusions of law with respect to that claim.

In his indictment, McLaurin was charged with the unrelated first-degree sexual assaults of C.C. (two counts) on August 19, 1988, J.T. (3 counts) on September 4, 1988, and B.S. (two counts) on September 6, 1988; and kidnapping of C.C. and B.S. (one count each). Prior to his November 14, 1989, trial, McLaurin filed a motion to sever these unrelated counts on the ground that "the trial of these numerous unrelated counts together will, in effect, constitute proof of unrelated misconduct and the cumulative effect of such proof will be to reinforce an impression of guilt on counts as to which the State's evidence is weak or nonexistent." Motion To Sever Unrelated Counts, filed November 15, 1989. At the motion hearing, defense counsel argued that only one victim (B.S.) could identify McLaurin as her assailant and that this is a classic case of "bootstrapping" since the crimes were not similar, were committed with different weapons, at different times, and at different locations. (Trial Transcript (Tr.) Volume (Vol.) I 18-20).

The prosecution contended that because identity was an issue in all of the cases, evidence of each incident would be admissible in all the cases, even if tried separately. (Tr. Vol. I 17). The prosecutor further argued that the descriptions the victims gave were the same (which is not correct[3]); the assailant asked each victim about their personal life and said he wished they had met under different circumstances (which is not correct as J.T. never said he made the latter comment); the assailant refused to let the victims look at him; and McLaurin's blood sample contained the same factors found in the seminal fluid taken from all three victims. (Tr. Vol. I 15-16). The serology evidence meant only that McLaurin was one of roughly 2,500 males in Kanawha County that could have been the assailant in the C.C. case. (Tr. Vol. II 634). This serology evidence was completely discredited in McLaurin's first habeas. See State ex rel.

[3] For example, C.C. described her assailant as a relatively stocky person with a muscular build and weighing approximately 160-170 lbs. (Tr. Vol. I 251, 280), while J.T. described her assailant as having a slender build and weighing 140-150 lbs. (Tr. Vol. I 328; Vol. II 370, 378).

McLaurin, 203 W.Va. at 73, 506 S.E.2d at 328. This resulted in the vacation of McLaurin's convictions and sentences for the C.C. kidnapping and sexual assaults due to insufficient evidence as there was no other evidence McLaurin committed the C.C. crimes.

The trial court denied McLaurin's motion for severance, ruling that the three incidents were "of a similar pattern and nature" and could be joined as they were part of a "common scheme or plan." (Tr. Vol. I 21, 123).

The facts of the three separate incidents do not show a common scheme or plan but demonstrate many more dissimilarities than similarities. For example, J.T. was assaulted in a Charleston hotel room in the morning while C.C. and B.S. were kidnapped in parking lots in Charleston (at night) and Montgomery (during the day), respectively, and forced to drive to different locations and assaulted. (Tr. Vol. II 360-63, 447-49, 451, 459; Vol. I 258-60, 262-63). J.T.'s assailant used a weapon similar to an ice pick and struck her with his fists while C.C's and B.S.'s assailants used a gun, but did not strike them. (Tr. Vol. II 365, 368, 449; Vol. I 260). Unlike C.C.'s and J.T.'s assailants, B.S.'s assailant forced her to hike into the woods, forced her to swallow pills, blindfolded her, taped her hands, and attempted to drive her car. (Tr. Vol. II 452-69). C.C.'s assailant spoke with a Jamaican accent and was unfamiliar with the Charleston area, but neither J.T. nor B.S. described their assailant that way. (Tr. Vol. I 250, 280).

The habeas court found there were sufficient similarities and factors connecting McLaurin to all of the crimes to constitute a common scheme, plan, or design: the three victims were assaulted within less than a three week span of time; J.T. and B.S. were attacked within two days of one another; J.T. and C.C. were both attacked in downtown Charleston; C.C. and B.S. were kidnapped in parking lots when they attempted to get in their cars and driven to isolated locations and assaulted; the assailant attempted to prevent all three victims from seeing his face;

B.S. and C.C. were threatened with a gun and J.T. with a knife; all three victims said their assailant was a black man; the crimes occurred within a short time after McLaurin's release from prison on an earlier rape conviction; the assailant made nearly identical remarks to B.S. and C.C.; B.S. was able to identify McLaurin; two maids saw McLaurin at the motel where J.T. was assaulted; and McLaurin's blood sample contained factors consistent with the seminal fluid in all three cases. Opinion Order, at 15-16.

At the conclusion of the evidence, defense counsel requested a jury instruction stating, *inter alia*, that the jury was not to presume McLaurin's guilt of the offenses of kidnapping and sexual assault involving C.C. or J.T. because of evidence offered in the B.S. incident; and that the State must separately prove the offenses involving each victim beyond a reasonable doubt. (Tr. Vol. III 792). The trial court denied this request "on the ground it would prohibit the State arguing system, motive and intent." (Tr. Vol. III 791). McLaurin claimed in his habeas petition that the trial court's refusal to give a limiting instruction regarding the permissible use of collateral crimes evidence denied him his due process right to a fair trial.

In denying this claim, the habeas court found that the requested instruction was not a correct statement of law; and even if the trial court erroneously refused to give a corrected instruction, "this is not a basis for habeas corpus relief." Opinion Order, at 17.

The habeas court further denied McLaurin's claim that his convictions and sentences for two counts of first-degree sexual assault on J.T. by sexual intercourse violated the double jeopardy clauses of the state and federal constitutions. Relying upon this Court's decision in State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989), the habeas court found that J.T.'s testimony indicated two separate offenses by sexual intercourse were committed. Opinion Order, at 18. J.T. testified that her assailant had sexual intercourse with her while she was on her

hands and knees; her assailant then stopped, ordered her to turn over, and sexually assaulted her again while she was lying on her back. Id.

Finally, McLaurin claimed that he was denied his right to counsel and the effective assistance of counsel by his trial attorneys failure at sentencing to say anything or present any mitigating evidence on his behalf. The only thing counsel did was request a pre-sentence investigation. (Tr. Vol. III 899-900). The habeas court failed to address this claim in its July 11. 2005, Opinion Order.

ASSIGNMENTS OF ERROR

I. McLaurin Was Denied Due Process Of Law When The Trial Court Refused To Grant Defense Counsel's Request For A Competency Evaluation One Week Before His Trial Based Upon Counsel's Belief McLaurin Was Incompetent To Stand Trial And Prison Psychiatric Records Indicating Possible Organic Brain Damage And Psychiatric Impairment. The Circuit Court Erred In Denying This Habeas Claim And In Failing To Even Address This Claim And Make Findings Of Fact And Conclusions Of Law.

II. The Trial Court's Refusal To Sever For Trial The Three Unrelated Sexual Assault Incidents Unfairly Prejudiced McLaurin And Denied Him His Due Process Right To A Fair Trial. The Circuit Court Erred In Denying This Habeas Claim By Erroneously Concluding That These Crimes Were Sufficiently Similar To Constitute A Common Scheme, Plan Or Design To Justify Their Trial Together.

III. The Trial Court's Refusal To Give A Limiting Instruction Regarding The Permissible Use Of Collateral Crimes Evidence Denied McLaurin His Due Process Right To A Fair Trial. The Circuit Court Erred In Denying This Habeas Claim And Concluding That Such Error Is Not A Basis For Habeas Corpus Relief.

IV. McLaurin's Convictions And Sentences For Two Counts Of First-Degree Sexual Assault On J.T. By "Sexual Intercourse" Violate State And Federal Double Jeopardy Prohibitions. The Circuit Court Erred In Denying This Habeas Claim.

V. McLaurin Was Constructively Denied His Right To Counsel And The Effective Assistance Of Counsel When His Trial Attorneys At Sentencing Failed To Say Anything Or Present Any Mitigating Evidence On His Behalf. The Circuit Court Erred In Failing To Address This Habeas Claim.

DISCUSSION OF LAW

I. McLaurin Was Denied Due Process Of Law When The Trial Court Refused To Grant Defense Counsel's Request For A Competency Evaluation One Week Before His Trial Based Upon Counsel's Belief McLaurin Was Incompetent To Stand Trial And Prison Psychiatric Records Indicating Possible Organic Brain Damage And Psychiatric Impairment. The Circuit Court Erred In Denying This Habeas Claim And In Failing To Even Address This Claim And Make Findings Of Fact And Conclusions Of Law.

In his habeas petition, McLaurin claimed that the trial court's refusal to grant defense counsel's last request for a psychiatric examination to determine McLaurin's competency to stand trial and criminal responsibility denied him due process of law. The circuit court denied this claim, but only addressed the trial court's refusal to provide an evaluation "to develop a psychiatric defense[,]" Opinion Order, at 12, finding that "there is no likelihood that [McLaurin] could have developed a psychiatric disability that would have altered the jury's verdict." Opinion Order, at 13. The circuit court failed to address McLaurin's claim that he was improperly denied a psychiatric evaluation to determine his competency to stand trial. In addition, this claim should have been granted as it was clearly shown there were significant questions raised regarding McLaurin's competency to stand trial.

Standard of Review

The standard of review for reviewing a circuit court's rulings on a habeas petition is as follows:

> 1. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. pt. 1, Burnside v. Burnside, 194 W.Va. 263, 460 S.E.2d 264 (1995).

Syl. Pt. 1, State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000).

The Circuit Court Failed To Address This Claim And Make The Required Findings Of Fact And Conclusions Of Law

West Virginia (W.Va.) Code § 53-4A-7(c) requires that the circuit court "shall make specific findings of fact and conclusions of law relating to each contention or contentions and grounds (in fact or law) advanced, shall clearly state the grounds upon which the matter was determined, and shall state whether a federal and/or state right was presented and decided." When a circuit court denies a habeas corpus petition without making these required findings, the denial must be reversed, and the case remanded so the circuit court can make the required findings. Banks v. Trent, 206 W.Va. 255, 257, 523 S.E.2d 846, 848 (1999); State ex rel. Watson v. Hill, 200 W.Va. 201, 488 S.E.2d 476 (1997).

Because the requirements of W.Va. Code § 53-4A-7(c) were violated, the circuit court's ruling must be reversed.

This Claim Should Have Been Granted As Trial Counsel Established There Was A Possible Problem With McLaurin's Competency To Stand Trial

W.Va. Code § 27-6A-1(a) requires a trial court to order a psychiatric examination of a criminal defendant at any stage of the proceedings if it has reason to believe the defendant may be incompetent to stand trial or is not criminally responsible. W.Va. Code § 27-6A-1(a) provides, in relevant part:

> Whenever a court of record. . . believes that a defendant in a felony case or a defendant in a misdemeanor case in which an indictment has been returned, or a warrant or summons issued, may be incompetent to stand trial or is not criminally responsible by reason of mental illness, mental retardation or addiction, it may at any stage of the proceedings after the return of an indictment or the issuance of a warrant or summons against the defendant, order an examination of such

defendant to be conducted by one or more psychiatrists, or a psychiatrist and a psychologist . . .

In this case, defense counsel gave the trial court substantial reasons to believe the defendant may not be competent and criminally responsible when counsel indicated he believed McLaurin was psychiatrically impaired and that his prison records indicated he suffered from organic brain damage, which affected his actions, including his inability to cooperate with counsel. Thus, even though this occurred one week before the scheduled trial, the trial court had a duty under the above statute to continue the trial and order the psychiatric examinations. The trial court's refusal to do so denied McLaurin his right to due process of law guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article III, § 10 of the W.Va. Constitution.

"It is a fundamental guaranty of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent." Syl. Pt. 5, State v. Hatfield, 186 W.Va. 507, 413 S.E.2d 162 (1991) (quoting State v. Cheshire, 170 W.Va. 217, 219, 292 S.E.2d 628, 630 (1982)). Accord Syl. Pt. 1, State v. Sanders, 209 W.Va. 367, 549 S.E.2d 40 (2001); State v. Paynter, 206 W.Va. 521, 527, 526 S.E.2d 43, 49 (1999). See also Drope v. Missouri, 420 U.S. 162, 171-72, 95 S.Ct. 896, 903-04 (1975); Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 1376 (1996). To protect this right, ". . . 'adequate state procedures must exist to make certain that a legally incompetent accused is not convicted.'" Paynter, 206 W.Va. at 527, 526 S.E.2d at 49 (quoting State v. Demastus, 165 W.Va. 572, 582, 270 S.E.2d 649, 656 (1980)); Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 838 (1966). Thus, even though McLaurin previously refused to submit to a psychiatric evaluation, the circuit court was obligated to order a competency evaluation if it had reason to believe he may not be competent to stand trial. Paynter, 206 W.Va. at 526 S.E.2d at 51; Pate, 383 U.S. at 378, 86 S.Ct. at 838.

Syllabus Point 1, State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976), states the standard for competency:

> No person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, the person is unable to consult with his attorney and to assist in the preparation of this defense with a reasonable degree of rational understanding of the nature and object of the proceedings against him.

See Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788 (1960). Accord Paynter, 206 W.Va. at 528 n. 6, 526 S.E.2d at 50 n.6; Syl. Pt. 6, State v. Barrow, 178 W.Va. 406, 359 S.E.2d 844 (1987). See also Syl. Pt. 2, State v. Arnold, 159 W.Va. 158, 219 S.E.2d 922 (1975), *overruled on other grounds* by Syl. Pt. 4, Demastus, 165 W.Va. 572, 270 S.E.2d 649. The West Virginia Supreme Court of Appeals has repeatedly held that "[w]hen a trial judge is made aware of a possible problem with defendant's competency, it is an abuse of discretion to deny a motion for psychiatric evaluation." Syl. Pt. 6, Paynter, 206 W.Va. 521, 526 S.E.2d 43 (quoting Syl. Pt. 4, Demastus, 165 W.Va. 572, 270 S.E.2d 649). Accord Syl. Pt. 1, State v. Moore, 193 W.Va. 642, 457 S.E.2d 801 (1995). In Paynter, the Court recognized that a circuit court may be alerted to a possible problem with the defendant's competency by several factors:

> A judge may be made aware of a possible problem with defendant's competency by such factors as: *a lawyer's representation concerning the competency of his client*; a history of mental illness or behavioral abnormalities; previous confinement for mental disturbance; documented proof of mental disturbance; evidence of irrational behavior; demeanor observed by the judge; and, psychiatric and lay testimony about competency. *State v. Arnold, supra* 219 S.E.2d, at 926, citing: *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

Paynter, 206 W.Va. at 528, 526 S.E.2d at 50 (quoting State v. Watson, 173 W.Va. 553, 557, 318 S.E.2d 603, 607-08 (1984) (quoting Demastus, 165 W.Va. at 582 n.9, 270 S.E.2d at 656 n.9) (Emphasis added by Court)).

In this case, after McLaurin was arraigned, the trial court granted defense counsel's request for a psychiatric competency examination. See Order, filed June 2, 1989. This examination was not conducted because counsel and McLaurin disagreed over presentation of a psychiatric defense. (11/7/89 Tr. 3). However, after obtaining McLaurin's prison mental health records, defense counsel, shortly before trial, persuaded McLaurin an examination was necessary and McLaurin agreed to it. On November 2, 1989, defense counsel filed a motion to continue McLaurin's November 13, 1989, trial so McLaurin could obtain a psychiatric evaluation.

At the November 7, 1989, hearing on this motion, defense counsel advised the trial court there was a possible problem with McLaurin's competency because McLaurin had not cooperated with counsel, counsel believed McLaurin was psychiatrically impaired, that his prison records indicated he suffers from organic brain damage, and that "his actions may be influenced by brain damage or psychiatric incapacity." (11/7/89 Tr. 3, 4, 12). Counsel told the trial court that "it has been apparent to me for some time that there are major issues of psychiatric capacity []" and McLaurin's ability to understand the consequences of his actions, the nature of the proceedings against him, and to cooperate in his defense. (11/7/89 Tr. 2). Counsel further stated:

> The Moundsville [prison] records, which we will be happy to make available to Ms. Berger, and I believe are equally available to her, are very, very clear that this individual -- we have references in those records of organic brain damage, and numerous references, which I think fairly presented to appropriate experts would cause them to conclude that this individual is psychiatrically impaired and was probably not responsible for his actions and may not be responsible, may not be able to cooperate effectively with his counsel in attempting to defend himself. (Emphasis added).

(11/7/89 Tr. 8). These prison records were admitted as Petitioner's Exhibit 2 at the habeas evidentiary hearing. (5/14/03 Tr. 131, 134) (4/25/03 Tr. 50-52). These prison records show that an October 8, 1975, psychological evaluation of McLaurin indicates he took the Bender Visual

Motor Gestalt test which revealed perceptual difficulties often associated with organic brain damage. (4/25/03 Tr. 51). This evaluation further stated that personality testing indicated McLaurin was an individual with probable severe emotional difficulties, likely experiences occasional psychotic episodes with feelings of paranoia and unreality and during which he is capable of grossly misinterpreting the actions of those around him. Id. On November 20, 1987, a psychological evaluation update was done which indicated there was no gross psychopathology present as in previous testing.

Defense counsel's representations concerning McLaurin's lack of cooperation with counsel, his psychiatric impairment, and prison records indicating he possibly suffered from organic brain damage and psychotic episodes, were substantial evidence there was a possible problem with McLaurin's competency to stand trial.

At the habeas evidentiary hearing, defense counsel Steven Miller testified that he believed McLaurin was not competent to stand trial:

* * *

Q. [Greg Ayers, habeas counsel] What do you recall, Mr. Miller, was the standard for the Court ordering a competency evaluation at that point?

A. [Steven Miller, defense counsel] I think if -- I think if there was a substantial issue of his competency to stand trial that the Court did not have discretion. It was -- the defendant had a right to an evaluation of those issues, at least on competency to stand trial. In other words, I think that the judge erred when he did not grant us the motion shortly before trial.

Q. Because you believed that, as his lawyer, you were representing to the Court that he was not competent to stand trial, correct?

A. That's right.

Q. And you supported it with his prison psychological records?

A. Yes, I did.

Q. And you believed that that was a substantial reason as to why he should be further evaluated before he proceeded to trial?

A. Yes, I did.

* * *

(4/25/03 Tr. 133-34). Mr. Miller further confirmed his belief McLaurin was incompetent to stand trial because of the difficulty he had communicating with McLaurin and obtaining his cooperation:

* * *

Q. [Greg Ayers, habeas counsel] Now, Mr. Miller, wasn't one of the reasons that you wanted Mr. McLaurin evaluated was because you had doubts about his mental competency to proceed? And one of the basis for that was because of the difficulty you had in communicating with him; is that correct? You felt that his -- that his mental problems were part of the problem?

A. [Steven Miller, defense counsel] Yes. That's a fair statement.

Q. And is it not true that part of the standard for competency to stand trial is the defendant's ability to cooperate and communicate with his lawyer?

A. Yes.

Q. And you were having difficulty doing that?

A. Yes.

* * *

(4/25/03 Tr. 135).

This Court noted in State v. Chapman, 210 W.Va. 292, 301, 557 S.E.2d 346, 355 (2001), that counsel's opinion regarding competency "is significant because . . . 'defense counsel will often have the best-informed view of the defendant's ability to participate in his defense.'" (quoting Medina v. California, 505 U.S. 437, 450, 112 S.Ct. 2572, 2580 (1992) (citations omitted)).

Despite defense counsel's representations regarding McLaurin's "psychiatric impairment," organic brain damage, and failure to cooperate, the trial court denied counsel's

motion for a competency examination and found McLaurin was competent to cooperate with his attorneys and assist them with presenting his defense. (11/7/89 Tr. 19). The trial court stated that "based on a layman's observation," it found nothing defective with McLaurin's reasoning process and ability to express himself. (11/7/89 Tr. 19). However, the trial court did not address the above representations and evidence presented by defense counsel or whether it made the court aware there was a possible problem with McLaurin's competency. When there is evidence in a defendant's medical records of possible organic brain damage, coupled with defense counsel's representations that the defendant is psychiatrically impaired and incompetent to stand trial, a trial court cannot reasonably rely solely on its lay observations to determine a defendant's competency or criminal responsibility. See Pate, 383 U.S. at 385, 86 S.Ct. at 842 ("While [the defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.").

The trial court's procedure for determining McLaurin's competency must be considered unreliable and fraught with the possibility the court's conclusion is erroneous. If one can reasonably rely on the trial court's personal observations when defense counsel has alerted the trial court to a possible problem with a defendant's competency, there would rarely be a need for a psychiatric examination. There is good reason why the legislature required a psychiatric examination when the trial court is alerted to a possible problem with competency, -- it is the only way to reliably determine this issue. The trial court's procedure for doing so in this case simply cannot be considered reliable. As this Court stated in Paynter,

> ". . . adequate state procedures must exist to make certain that a legally incompetent accused is not convicted." State v. Demastus, 165 W.Va. 572, 582, 270 S.E.2d 649, 656 (1980) (citing State v. Harrison, 36 W.Va. 729, 15 S.E. 982 (1982), Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956), Pate v. Robinson, 383 U.S. 375, 386, 86 S.Ct. 836, 842-43, 15 L.Ed.2d 815, 822-23 (1996), and Martin v. Estelle, 492 F.2d 1120 (5th Cir. 1974)). . . . A

> circuit court's failure to follow the proper statutory procedures to preserve this fundamental due process guarantee affects a defendant's substantial rights. Lastly, such failure creates a greater risk that mentally incompetent individuals will be improperly subjected to trials wherein they may be convicted and sentenced in violation of their due process rights, thus, seriously affecting the fairness, integrity and public reputation of judicial proceedings.

Paynter, 206 W.Va. at 526-27, 526 S.E.2d at 48-49.

The trial court further denied McLaurin's request for a psychiatric evaluation because it was not timely made within a reasonable time prior to trial. (11/7/89 Tr. 19). McLaurin submits this was the real reason behind the trial court's ruling. However, as demonstrated above, W.Va. Code § 27-6A-1(a) imposes a duty on the trial court to order a psychiatric examination at any stage of the proceedings when the trial court believes there is a possible problem with competency or criminal responsibility. Thus, in view of the evidence before the trial court, it was an abuse of discretion for the court to base its ruling on untimeliness. Further, as defense counsel told the trial court, it "penalize[s] [McLaurin] for being psychiatrically impaired and for not up to this point agreeing with his counsel and their attempts to defend him on what appears to be the only viable basis that he can be defended." (11/7/89 Tr. 8). See Hatfield, 186 W.Va. at 514 n.12, 413 S.E.2d at 169 n. 12 ("it is possible that [defendant's] mental competence, or lack thereof, was directly related to his decision to not follow counsel's advice.").

This case is very similar to State ex rel. Webb v. McCarty, 208 W.Va. 549, 542 S.E.2d 63 (2000), where the trial court initially ordered a psychiatric evaluation that was not completed and the trial court found "that the failure to complete the examination was due to Ms. Webb's lack of cooperation." Id. at 551 n.2, 542 S.E.2d at 65 n.2. Ms. Webb sought a stay of her trial in a prohibition action in this Court to require the trial court to allow her to complete the previously ordered psychiatric examination. This Court held the trial court abused its discretion in failing to

allow Ms. Webb the mental exanimation even though the examination had not been completed a full year after it was ordered:

> The judge was correct when he made his initial determination that Ms. Webb should receive a mental examination pursuant to W.Va. Code § 27-6A-1. While we understand his natural frustration that the examination was not complete a full year after he ordered it, that delay alone is not reason to forgo the examination. In other words, if Ms. Webb's competency were in doubt a year ago, mere delay, in and of itself, cannot have eliminated those doubts.

Id. at 554, 542 S.E.2d at 68. Noting the profound importance of protecting a defendant's right not to be tried while incompetent, the Court further stated that "where she [Ms. Webb] has not completed even one mental examination, the need for her prompt evaluation is just as great." Id. at 555, 542 S.E.2d at 69. Cf. State v. Myers, 167 W.Va. 663, 280 S.E.2d 299 (1981) (trial court did not err in refusing to require mental examination where defendant initially refused to cooperate and there was nothing presented to trial court to suggest that defendant was mentally incompetent).

The Webb analysis is equally applicable here. Even though the failure to conduct a psychiatric examination a few months earlier in the case may be due to McLaurin's lack of cooperation, the need to conduct an evaluation was still just as great.

The trial court's failure to observe the statutory procedures necessary to protect McLaurin's right not to be tried while incompetent denied him his fundamental due process right to a fair trial.

II. The Trial Court's Refusal To Sever For Trial The Three Unrelated Sexual Assault Incidents Unfairly Prejudiced McLaurin And Denied Him His Due Process Right To A Fair Trial. The Circuit Court Erred In Denying This Habeas Claim By Erroneously Concluding That These Crimes Were Sufficiently Similar To Constitute A Common Scheme, Plan Or Design To Justify Their Trial Together.

McLaurin was charged with seven first-degree sexual assaults and two kidnappings involving three unrelated incidents/victims (C.C. on August 19, 1988, J.T. on September 4, 1988, and B.S. on September 6, 1988). Defense counsel moved to sever these charges on the ground that "the trial of these numerous unrelated counts together will, in effect, constitute proof of unrelated misconduct and the cumulative effect of such proof will be to reinforce an impression of guilt on counts as to which the State's evidence is weak or nonexistent." Opinion Order, at 10, ¶ 15. The trial court denied this motion, ruling that the crimes showed a "common scheme or plan." (Tr. Vol. I 21, 123). The habeas court below likewise found that these three separate sexual assault incidents were sufficiently similar "to constitute a common scheme, plan, or design. Opinion Order, at 10, ¶ 16. This conclusion is legally erroneous as the three unrelated sexual assault incidents are not so factually similar that they meet the legal definition of common scheme, plan, or design.

This Court recognizes that ". . .joinder or consolidation [of charges] may prejudice the defendant because the jury may tend to cumulate the evidence of the various offenses and convict the defendant on all offenses charged on the theory he is a bad individual rather then weigh the evidence separately on each offense." State v. Mitter, 168 W.Va. 531, 543, 285 S.E.2d 376, 383 (1981). Accord State v. Hatfield, 181 W.Va. 106, 110, 380 S.E.2d 670, 674 (1988). Moreover, "[t]he danger of prejudice increases where, as here, the initial joinder or consolidation is premised on the similar character of unrelated offenses." Id. at 111, 380 S.E.2d at 675. This case is a classic example of such prejudice resulting from the improper joinder for trial of the completely unrelated sexual assaults of three different women (C.C., J.T., and B.S.).

The prosecutor sought joinder of these offenses to cumulate the evidence against McLaurin because the identity of the offender in each case was the primary issue and two of the

three victims (C.C. and J.T.) could not identify their assailant and there was no physical evidence identifying McLaurin as their assailant. The prosecutor clearly used the third victim's case (B.S.), where there was an identification and physical evidence found at the scene, to bootstrap the other two cases. The trial court's ruling that these three unrelated sexual assaults showed a common scheme or plan was clearly erroneous. There was no common scheme or plan to these crimes and there were many more dissimilarities between the sexual assaults than similarities. Thus, if there had been separate trials for each offense, the evidence of the other two sexual assaults would not have been admissible.

In Hatfield, this Court held that a trial court could order separate trials where the joinder of charges is prejudicial:

> Even where joinder or consolidation of offenses is proper under the West Virginia Rules of Criminal Procedure, the trial court may order separate trials pursuant to Rule 14(a) on the ground that such joinder or consolidation is prejudicial. The decision to grant a motion for severance pursuant to W.Va.R.Crim.P. 14(a) is a matter within the sound discretion of the trial court.

Id. at Syl. Pt. 3. Rule 14, West Virginia Rules of Criminal Procedure (W.Va.R.Crim.P.), is modeled after Rule 14 of the Federal Rules of Criminal Procedure, and under federal law the trial court must consider in some depth a motion to grant a severance if:

> (a) a joint trial will raise so many issues that a jury may conclude that the defendant is a 'bad [person]' and must have done something, and consequently will convict him as a 'bad [person]' rather than on a particular charge; (b) if one offense may be used to convict him of another, though proof of that guilt would have been inadmissible at a separate trial; and (c) the defendant may wish to testify in his own defense on one charge but not on another. *See* C.A. Wright, Federal Practice and Procedure: Criminal 2d § 222 (1982).

State v. Milburn, 204 W.Va. 203, 208, 511 S.E.2d 828, 833 (1998) (quoting State v. Ludwick, 197 W.Va. 70, 73, 475 S.E.2d 70, 73 (1996)).

On the other hand, a defendant is not prejudiced when evidence of each of the crimes would be admissible in a separate trial for the other. Id. at 209, 511 S.E.2d at 834; State v. Penwell, 199 W.Va. 111, 118, 483 S.E.2d 240, 247 (1996). In this case, the jury very likely convicted McLaurin because it concluded he was a bad person due to the cumulation of evidence against him since evidence of each of the crimes charged would not have been admissible in a separate trial for the other. Therefore, the real issue in this case is whether the C.C., J.T., and B.S. sexual assault crimes would have been admissible at separate trials for each incident.

In Syllabus Points 11 and 12, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974), the Court indicated that evidence of the commission of other offenses, even though they are of the same nature as the one charged, is inadmissible unless such offenses are an element of or are legally connected with the charged offense via one of the following exceptions:

> The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: the evidence is admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial. (Emphasis added).

Id. at Syl. Pt. 12. Accord Syl. Pts. 1 and 2, State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986), *overruled on other grounds*, State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990). In this case, the trial court found the three unrelated sexual assault incidents could be tried together because they were part of a common scheme or plan. (Tr. Vol. I 21, 123). See Rule 8, W.Va. R.Crim.P. If the trial court was correct, each unrelated sexual offense would be admissible at a separate trial of the other offenses. However, the trial court erred in concluding the C.C., J.T., and B.S. sexual assaults were part of a common scheme or plan.

These separate crimes were not so related to each other that proof of one tends to establish the others or the identity of the offender(s). Syl. Pt. 12, Thomas, 157 W.Va. 640, 203 S.E.2d 445; Syl. Pt. 2, Dolin, 176 W.Va. 688, 347 S.E.2d 208. In this regard, State v. McDaniel, 211 W.Va. 9, 560 S.E.2d 484 (2001), indicates what constitutes evidence of a common scheme or plan, also known as modus operandi:

> *Modus operandi* is the "theory that where a defendant commits a series of crimes which bear a unique pattern such that the *modus operandi* is so unusual it becomes like a signature." State v. Dolin, 176 W.Va. at 698, n. 14, 347 S.E.2d at 218, n. 14. *Modus operandi* may be admissible as Rule 404(b) evidence.
>
> > Other-crime evidence may be admitted if the evidence of other crimes is so distinctive that it can be seen as a "signature" identifying a unique defendant, such as the infamous Jack the Ripper . . .. [E]vidence of the same type of crime is not sufficient on this theory unless the particular method of committing the offense, the *modus operandi* (or m.o.), is sufficiently distinctive to constitute a signature. Other-crimes evidence is not permissible to identify a defendant as the perpetrator of the charge act simply because he or she has at other times committed the same garden variety criminal act . . .
>
> 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 404.22[5][c], at 404-121 to 404-122 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.2001). (Emphasis added).

Id. at 13, 560 S.E.2d at 488. See also United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir. 1978) (Court noted that Professor McCormick states that to prove other like crimes are the handiwork of the accused "[t]he device used must be so unusual and distinctive as to be like a signature.").

The evidence relating to the three sexual assault incidents in this case was not so unique or so distinctive to constitute a "signature" identifying McLaurin as the perpetrator of each. Actually, there are many more dissimilarities than similarities between these three separate assaults. For example,

1. J.T. was sexually assaulted in a hotel room while working as a maid at a Charleston hotel and C.C. and B.S. were kidnapped in parking lots in Charleston and Montgomery (28 miles

from Charleston), respectively, and forced to drive to other, different locations in Kanawha County and sexually assaulted. (Tr. Vol. II 360-62; Vol. I 258-60, 262-63; Vol. II 447-49, 451, 459).

2. J.T.'s assailant used a weapon similar to an ice pick and C.C.'s and B.S.'s assailants used a gun. (Tr. Vol. II 368; Vol. I 260; Vol. II 449).

3. J.T.'s assailant struck her with his fists (Tr. Vol. II 365), but no such striking occurred to C.C. and B.S..

4. J.T.'s assailant fingered her vagina and sexually assaulted her from behind initially and C.C. and B.S. were assaulted frontally only. (Tr. Vol. II 363, 370; Vol. I 263, 265-66; Vol. II 458-59, 467-68).

5. C.C.'s assailant requested oral sex, but such a request was not made in the other two cases. (Tr. Vol. I 281).

6. B.S.'s assailant asked if he could have sex with her (Tr. Vol. II 457); C.C.'s assailant told her he was going to teach her a lesson (Tr. Vol. I 262): and J.T.'s assailant ordered her to assume the sexual positions he wanted. (Tr. Vol. II 363-64).

7. C.C.'s assailant spoke with a Jamaican accent and was unfamiliar with the Charleston area (Tr. Vol. I 250, 280), but neither B.S. nor J.T. described their assailant in that way.

8. J.T. described her assailant as having a bad odor (Tr. Vol. II 370), but C.C. and B.S. did not.

9. C.C.'s assailant wiped her car to remove fingerprints (Tr. Vol. I 269-70), but B.S. did not say her assailant engaged in such behavior.

10. B.S.'s assailant forced her to hike into the woods, forced her to swallow pills, blindfolded her, taped her hands, and attempted to drive her car (Tr. Vol. II 452-69), but none of these activities occurred with respect to C.C. and J.T.

11. J.T.'s assailant did not tell her he wished they had met under different circumstances as did C.C.'s and B.S.'s assailants. (Tr. Vol. I 286; Vol. II 463).

12. J.T. was assaulted in the morning (Tr. Vol. II 360), B.S. in the afternoon (Tr. Vol. II 447-49), and C.C. at night. (Tr. Vol. I 258-60).

The above circumstances demonstrate there was no common scheme or plan to the three unrelated sexual assaults and that they bore no unique or similar pattern so distinctive or unusual that it was like a signature. See McDaniel, 211 W.Va. at 13, 560 S.E.2d at 488. Nevertheless,

the habeas court below found there was a common plan, scheme or design to the three unrelated sexual assaults, based upon the following findings of fact:

> Although there were some dissimilarities between the three sexual assaults there were sufficient similarities and other factors connecting Petitioner to the crimes to constitute a common scheme, plan or design.
>
> In this case, the three victims were all assaulted within less than a three week span of time. J.T. and B.S. were attacked within two days of one another. J.T. and C.C. were both in downtown Charleston when they were attacked. C.C. and B.S. were both kidnapped in parking lots when they attempted to get into their cars, and were forced to drive to isolated spots, where the assaults occurred. In each case, the assailant attempted to prevent the victim from seeing his face. B.S. and C.C. were threatened with a gun, and J.T. threatened with a knife. The crimes all occurred within a short time after petitioner's release from prison on an earlier rape conviction. All three identified their assailant as a black man. The assailant made remarks to B.S. and C.C. which were nearly identical. There were other similarities among the assaults as well.
>
> B.S. was able to identify the Petitioner as her assailant. Furthermore, two maids saw the Petitioner near the time and at the motel where J.T. was sexually assaulted. Finally, Petitioner's blood sample contained factors consistent with the seminal fluid in all there cases.

Opinion Order, at 15-16.

The above facts clearly do not meet the McDaniel definition of a common plan, scheme, or design, i.e., evidence in each of the crimes that is so unusual or distinctive "that it can be seen as a "signature" identifying a unique defendant . . ." McDaniel, 211 W.Va. at 13, 560 S.E.2d at 488. The only facts common to each of the three incidents are:

1. The three victims were all assaulted within less than a three week time span.

2. The assailant in each case attempted to prevent the victim from seeing his face.

3. The crimes all occurred within a short time after petitioner's release from prison on an earlier rape conviction.

4. All three victims identified their assailant as a black man.

5. McLaurin's blood sample contained factors consistent with the seminal fluid in all three cases.

None of the above facts are so unusual or distinctive that they constitute a "signature" and identify McLaurin as the perpetrator of the crimes. The only fact that comes close is the blood factor evidence. However, the blood factor evidence only proved that McLaurin could not be excluded from the eligible pool of people who could have supplied the seminal fluid. For example, Fred Zain, whose testimony has now been totally discredited by this Court, see In Re An Investigation of West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 337-38, 438 S.E.2d 501, 517-18 (1993), testified that McLaurin, due to his blood factors, was one of roughly 2,500 males in Kanawha County that could have been the assailant in the C.C. case. (Tr. Vol. II 634). This is not unique or unusual "signature" evidence from which one can conclude the same individual committed all three assaults.

> A much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind. E. Cleary, McCormick on Evidence s 170, p. 452 (rev. ed. 1972). Compare United States v. Goodwin, 492 F.2d at 1154, with United States v. Shadletsky, 491 F.2d 677, 678 (5th Cir. 1974). We have consistently held that for evidence of other crimes to be admissible the inference of identity flowing from it must be extremely strong.

United States v. Myers, 550 F.2d 1036, 1045 (5th Cir. 1977). See McCormick on Evidence, § 190 at 563 (3d ed. 1984).

Moreover, the other facts identified by the habeas court below show there was not a common plan or scheme to the three unrelated incidents that was so distinctive to identify McLaurin as the perpetrator of all three. For example,

1. J.T. and C.C. were in downtown Charleston when attacked, but B.S. was in Montgomery.

2. C.C. and B.S. were kidnapped in parking lots in Charleston and Montgomery, respectively, when they attempted to get in their cars, but J.T. was assaulted in a Charleston hotel while she worked as a maid.

3. C.C. and B.S. were threatened with a gun, and J.T. was threatened with a knife (ice pick).

4. The assailant made nearly identical remarks to C.C. and B.S., but did not make them to J.T.

These facts serve to distinguish the three unrelated sexual assault incidents and demonstrate their dissimilarity rather than signature evidence linking them.

In addition, that two maids said they saw McLaurin at the hotel where J.T. was assaulted does not show a common scheme or plan or prove identity to justify joinder of the offenses for trial.[4] See, e.g., Hatfield, 181 W.Va. at 111, 380 S.E.2d at 675 (defendant's two counts of abduction with intent to defile should have been severed for trial even though the defendant was identified as perpetrator of both because "[t]he offenses were clearly separate and distinct, and were not so similar in nature that evidence of one crime would have been admissible at a separate trial for the other. *See* W.Va.R.E. 404(b). Moreover the nature of the offenses substantially increased the risk of prejudice.").

The trial court's subsequent vacation of McLaurin's conviction for the C.C. kidnapping and sexual assault on grounds of insufficient evidence, see State ex rel. McLaurin v. Trent, 203

[4] Moreover, their identifications of McLaurin were very questionable. At the pretrial hearing on the motion to suppress the identifications, when the trial court asked Carmen Hairston, one of the hotel maids, about her identification of McLaurin, "But you are not really sure, are you?," Hairston shook her head. (Tr. Vol. I 86-87). Susan Toney, the other hotel maid, described the man she saw as "not real big," weighing about 140 pounds. (Tr. Vol. I 346). McLaurin's arrest ticket (in the circuit clerk's file) on September 8, 1988, indicates he weighed 190 pounds. Toney also did not know if the man was wearing glasses or had a beard. (Tr. Vol. I 67).

W.Va. 67, 72-73, 506 S.E.2d 322, 327-28 (1998), demonstrates its inadmissibility as collateral crime evidence under Rule 404 (b), W.Va. Rules of Evidence, because there is no evidence, not even by a preponderance, McLaurin committed the C.C. crimes. See McDaniel, 211 W.Va. at 13, 560 S.E.2d at 488 (under Rule 404 (b) state must prove uncharged crime or "bad act" by a preponderance of evidence). The only evidence linking McLaurin to the C.C. assault was the Fred Zain blood factor evidence which, even assuming it was valid, only put McLaurin in a pool of roughly 2,500 males in Kanawha County that could have committed the crime. (Tr. Vol. II 634). Thus, there was no justification for joining the C.C. counts with the others in this case.

This is not a case like State v. Clements, 175 W.Va. 463, 470, 334 S.E.2d 600, 608 (1985), where the defendant was not prejudiced by the joint trial of two kidnapping and two murder charges based upon the simultaneous disappearance of two women from the same location and the subsequent discovery of their bodies at another location. See also State v. Hottle, 197 W.Va. 529, 536, 476 S.E.2d 200, 207 (1996) (Court found joinder of charges proper where defendant's various crimes were linked by a common plan or scheme, written out by defendant, and common evidence concerning a .22 caliber Ruger pistol and yellow GEO Storm).

The three unrelated assaults in this case were not linked by a common plan or scheme or common evidence that would identify McLaurin as the assailant in all three cases. Yet the State was permitted to use prejudicial evidence in each of three separate and distinct cases to bolster its evidence in each of the other two, and then, in turn, use the two bolstered cases to enhance the evidence against McLaurin in the other. Simply put, the State's evidence was permitted to feed upon itself and to merge the counts of the indictment into an amorphous whole -- obscuring evidentiary weaknesses while exaggerating evidentiary strengths. Defense to individual counts of the indictment became impossible. The circuit court's subsequent vacation of McLaurin's

sexual assault and kidnapping convictions on the C.C. counts is convincing evidence of this. It was all or nothing, a fact not lost on either the State or the trial court.[5]

Since, as demonstrated above, evidence of the three unrelated sexual assaults would not have been admissible had there been separate trials for each incident, the trial court failed to properly exercise its discretion by permitting evidence of all three incidents to be introduced at one trial. The trial court's denial of McLaurin's motion for severance was a failure to scrupulously protect his constitutional right to a fair trial and an abuse of discretion.

> In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right to the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried. (Emphasis added).

Syl. Pt. 16, Thomas, 157 W.Va. 640, 203 S.E.2d 445. Accord Syl. Pt. 11, State v. Ramey, 158 W.Va. 541, 212 S.E.2d 737 (1975), *overruled on other grounds*, State v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977).

As a result of the improper joinder of the separate sexual assaults of C.C, J.T., and B.S. for trial, McLaurin was severely prejudiced. As stated by this Court in McDaniel:

> In the instant case, the potential for unfair prejudice, by permitting evidence to come before the jury alleging that the defendant had previously raped a woman, was enormous. Any jury, no matter how well instructed, would be sorely tempted to convict a defendant simply because of such a prior act, regardless of the quantum of proof of the offense for which the defendant was actually charged. "The trial court must understand that it alone stands as the trial barrier between

[5] Efforts by defense counsel to instruct the jury, in part, that the State's evidence "of the offenses charged as to each such victim must separately prove such offenses against such victim beyond a reasonable doubt," were unsuccessful. (Tr. Vol. III 792). The prosecutor urged the court that such a statement took away "from the system, motive and intent evidence that all through these cases there is system motive and intent evidence which would be offered in each case." (Tr. Vol. III 791). The court agreed: "I'm going to refuse it on the ground that it would prohibit the State arguing system, motive and intent." (Tr. Vol. III 791). See also McLaurin's third assignment of error.

legitimate use of Rule 404(b) evidence and its abuse." *State v. McGinnis*, 193 W.Va. at 155, 455 S.E.2d at 524. (Emphasis added).

McDaniel, 211 W.Va. at 15, 560 S.E.2d at 490. See also State v. McGinnis, 193 W.Va. 147, 153, 455 S.E.2d 516, 522 (1994); State v. LaRock, 196 W.Va. 294, 311, 470 S.E.2d 613, 630 (1996).

McLaurin's case is no exception. There can be little question the jury considered the cumulative evidence against McLaurin in deciding his guilt or innocence with respect to each of the victims. Thus, given the extremely prejudicial nature of other collateral crimes evidence, the trial court's admission of this inadmissible evidence in McLaurin's trial denied him his state and federal constitutional due process rights to a fair trial. Fourteenth Amendment, U.S. Constitution; Article III, § 10, W.Va. Constitution. See U.S. v. Lane, 474 U.S. 438, 446 n.8, 106 S.Ct. 725, 730 n.8 (1986) (misjoinder becomes "a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.").

III. The Trial Court's Refusal To Give A Limiting Instruction Regarding The Permissible Use Of Collateral Crimes Evidence Denied McLaurin His Due Process Right To A Fair Trial. The Circuit Court Erred In Denying This Habeas Claim And Concluding That Such Error Is Not A Basis For Habeas Corpus Relief.

The unfair prejudice created by the joinder for trial of the nine count indictment against McLaurin, and the simultaneous use of the same nine counts as both substantive crimes and collateral crimes evidence, was exacerbated by the trial court's failure to provide a limiting instruction to the jury. The jury was provided no guidance as to the limited use for which they might properly consider what the State characterized as collateral crimes evidence against McLaurin. Specifically, the jury was not told that in deciding McLaurin's guilt as to each individual count it could not consider separate evidence of the other incidents as proof of guilt, but only as to whether it showed a common scheme or plan or McLaurin's identity as the person

who committed the offense. See Syl. Pt. 12, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974). McLaurin was thereby denied his state and federal constitutional due process rights to a fair trial. Fourteenth Amendment, U.S. Constitution; Article III § 10, W.Va. Constitution.

Defense counsel requested a jury instruction informing the jury that the State must separately prove the offenses against each of the victims.[6] (Tr. Vol. III 792). The prosecutor objected on the ground that such an instruction took away "from the system, motive and intent evidence that [is] all through these cases [, and] there is system motive and intent evidence which would be evidence offered in each case." (Tr. Vol. III 791). The trial court agreed: "I'm going to refuse it on the ground that it would prohibit the State arguing system, motive and intent." (Tr. Vol. III 791).

The habeas court below found that (1) the trial court did not err in denying defense counsel's requested instruction as it was not a correct statement of law; and (2) even if the trial court erred in failing to give a corrected cautionary instruction, "this is not a basis for habeas corpus relief." Opinion Order, at 17. The lower court erred as this Court has made it clear that the trial court has a duty to give this important limiting instruction which is essential to protect a defendant's right to a fair trial.

In State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986), *overruled on other grounds*, State v. Edward Charles L, 183 W.Va. 641, 398 S.E.2d 123 (1990), the Supreme Court stated the rationale for requiring a limiting instruction for collateral crimes evidence:

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[6] Defendant's Instruction No. 8 provided, in its entirety: The Court instructs the jury that you are to make no presumption of the defendant's guilt of the offenses of kidnapping and sexual assault on C.C. or J.T. because of evidence offered in the case of B.S. The evidence offered by the State in support of the offenses charged as to each such victim must separately prove such offenses against such victim beyond a reasonable doubt. If you find that the evidence offered to prove the offenses charged is insufficient to prove that John McLaurin was the perpetrator of the offenses against J.T. or C.C. you must find the accused not guilty of all six such counts.

> 'The rationale for the rule announced in *Thomas* is that when one is placed on trial for the commission of a particular offense, he is to be convicted, if at all, on evidence of the specific charge against him. The purpose of the rule excluding evidence in a criminal prosecution of collateral offenses is to prevent a conviction for one crime by the use of evidence tending to show that the accused engaged in other legally unconnected criminal acts, and to prevent the inference that because the accused engaged or may have engaged in other crimes previously, he was more liable to commit the crime for which he is being tried.'

Id. at 692, 347 S.E.2d at 212 (quoting State v. Harris, 166 W.Va. 72, 76, 272 S.E.2d 471, 474 (1980)). Thus, where requested, the trial court is required to give a jury instruction limiting the use of this evidence:

> It is customary to give the jury a limiting instruction with regard to its consideration of a collateral crime. This instruction generally provides that the evidence of a collateral crime is not to be considered as proof of the defendant's guilt on the present charge, but may be considered in deciding whether a given issue or element relevant to the present charge has been proven. When a defendant requests this limiting instruction, it must be given.

Syl. Pt. 9, Dolin, 176 W.Va. 688, 347 S.E.2d 208. Accord State v. McGinnis, 193 W.Va. 147, 156, 455 S.E.2d 516, 525 (1994).

In State ex rel. Caton v. Sanders, 215 W.Va. 755, 601 S.E.2d 75 (2004), this Court noted that McGinnis requires that the precise purpose for which the collateral crimes is admitted "'must be told to the jury in the trial court's instruction.'" Id. at 762, 601 S.E.2d at 82 (quoting Syl. Pt. 1, in part, McGinnis, 193 W.Va. 147, 455 S.E.2d 516). The Court then reiterated that "[t]o ensure that the jury does not use the [collateral crimes] evidence for an improper purpose," . . . "a limiting instruction shall be given at the time the evidence is offered and must be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Id. The Court further stated that while McGinnis recommended that the limiting instruction be given in the trial court's general charge to the jury, it was now making "clear that such an instruction is mandatory." Id. at 762 n. 7, 601 S.E.2d at 82 n. 7.

Despite defense counsel's request in this case, the trial court refused to advise the jury as to any limitation on the use of collateral crimes evidence; and the jury was free to infer from this evidence that McLaurin had a criminal propensity or disposition to commit the other crimes on which the jury was required to return a verdict. While McLaurin was entitled to a more specific instruction than that requested by defense counsel as to the permissible use by the jury of collateral crime evidence, he was no less entitled to the limiting instruction he requested. The trial court's refusal to give McLaurin's requested instruction was reversible error as (1) it was "a correct statement of the law; (2) it was not substantially covered in the charge to the jury; and (3) it concern[ed] an important point in the trial so that the failure to give it seriously impair[ed] [McLaurin's] ability to effectively present a defense." Syl. Pt. 11, State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Moreover, under the particular facts of this case, with the real probability of unfair prejudice to McLaurin from the collateral crimes evidence, the trial court had a duty to properly instruct the jury on this issue once defense counsel requested a limiting instruction. If the trial court thought defense counsel's requested instruction was incorrect, the court had a duty to correct or amend it since "[u]ltimately, the responsibility to ensure in criminal cases that the jury is properly instructed rests with the trial court." State v. Miller, 184 W.Va. 367, 368, 400 S.E.2d 611, 612 (1990) (quoting State v. Lambert, 173 W.Va. 60, 63, 312 S.E.2d 31, 34 (1984)). See State v. Dozier, 163 W.Va. 192, 196, 255 S.E.2d 552, 555 (1979). In Lambert, the Supreme Court recognized this duty:

> "As a general rule, a trial court is under no duty to correct or amend an erroneous instruction, but where, in a criminal case, a defendant has requested an instruction, defective in some respect, on a pertinent point vital to his defense, not covered by any other charge, and which is supported by uncontradicted evidence; and because of the state of the evidence relied upon for conviction, and the peculiar facts and circumstances of the case, a failure to instruct on this important

> point, may work a miscarriage of justice, it is error for the trial court not to correct the instruction and give it in proper form." Syl. *State v. Brown*, 107 W.Va. 60, 146 S.E. 887 (1929). (Emphasis added).

Id. at Syl. See also Dolin, 176 W.Va. at 696, 347 S.E.2d at 216; McGinnis, 193 W.Va. at 156, 455 S.E.2d at 525; State v. LaRock, 196 W.Va. 294, 311, 470 S.E.2d 613, 630 (1996). As stated in State v. Romine, 166 W.Va. 135, 137, 272 S.E.2d 680, 682 (1980), "[t]he jury must be clearly and properly advised of the law in order to render a true and lawful verdict."

Thus, the habeas court was incorrect in ruling that the trial court did not err in refusing to give trial counsel's proposed cautionary instruction. The habeas court further incorrectly found that even if the trial court committed error in failing to give a corrected instruction, this error is not a basis for habeas corpus relief. Opinion Order, at 17. This conclusion is legally erroneous as the denial of a fair trial due to the admission and/or improper consideration of collateral crime evidence is a fundamental due process violation, as this Court recognized in McGinnis, 193 W.Va. at 164, 455 S.E.2d at 533:

> As we said in *[State v.] Thomas*, "the indiscriminate receipt of such evidence in volume and scope can predispose the minds of the jurors to believe the accused guilty of the specific crime by showing him guilty or charged with other crimes. . . . The excessive zeal of the prosecutor in introducing evidence of collateral crimes can and has affected the accused's right to a fair trial." 157 W.Va. at 656-57, 203 S.E.2d at 456.

It goes without saying that unless the jury is correctly instructed on how the collateral crime evidence may be used, the defendant's right to a fair trial is likewise compromised. See Marshall v. Commonwealth, 361 S.E.2d 634, 640 (Va. App. 1987) ("The right of the [rape] defendant to a fair trial required that the trial court here instruct the jury in clear and specific terms as to the purpose for which the [subsequent rape] evidence . . . was admitted and the limitations of the consideration thereof."); Weber v. State, 547 A.2d 948, 963 (Del. 1988) ("Thus, due process requires that whenever evidence of other crimes is admitted, the

requirements of [Delaware Rule of Evidence] 105 must be expanded to make a limiting instruction mandatory. . . Del. Const. art. I, § 7.").

Because the trial court improperly refused McLaurin's request for an instruction to limit the jury's consideration of the collateral crimes evidence, McLaurin was denied his constitutional due process rights to a fair trial.

IV. McLaurin's Convictions And Sentences For Two Counts Of First-Degree Sexual Assault On J.T. By "Sexual Intercourse" Violate State And Federal Double Jeopardy Prohibitions. The Circuit Court Erred In Denying This Habeas Claim.

The habeas court below upheld McLaurin's convictions and sentences for two counts of first-degree sexual assault on J.T. by "sexual intercourse," rejecting his claim they constituted the same offense instead of two separate offenses. Opinion Order, at 17-18. The circuit court erred as J.T.'s testimony establishes only one act of "sexual intercourse." McLaurin's convictions and sentences for two counts of first-degree sexual assault therefore violate state and federal double jeopardy prohibitions.

The habeas court correctly found the facts concerning this claim, established by J.T.'s testimony:

> In the J.T. case, the victim testified that her assailant had sexual intercourse with her while she was on her hands and knees. He then stopped and ordered her to turn over, and assaulted her again while she was lying on her back. These were treated as two separate counts of sexual assault.

Opinion Order, at 18. However, the lower court wrongly concluded that this Court's decision in State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989), requires two convictions for sexual assault rather than one:

> In that case, the victims were subjected to the same types of sexual assault with only brief interruptions in between. The Court held that each of these acts,

> separated by only very brief periods of time, were distinct acts of sexual assault, and conviction on each separate count did not violate Double Jeopardy principles. This case is controlling here, and therefore this claim by [McLaurin] cannot prevail.

Opinion Order, at 18.

The habeas court misapplied Woodall because the Woodall Court held there must be "conclusive evidence of elapsed time between separate violations []" before a defendant may be convicted of separate counts of sexual assault. Syl. Pt. 7, in part, Woodall, 182 W.Va. 15, 385 S.E.2d 253. The Woodall Court further indicated that the victims' testimony showed there was elapsed time between separate acts. Id. at 25, 385 S.E.2d at 263.

Here, there was no elapsed time between the two acts of sexual intercourse. One act of vaginal sexual intercourse immediately followed the other. Therefore, McLaurin's conviction and sentence for the second act of sexual intercourse (count five) constitutes a multiple punishment for the same offense and violates the double jeopardy clauses of the Fifth Amendment to the U.S. Constitution and Article III, § 5 of the W.Va. Constitution. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969), *overruled on other grounds*, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201 (1989); Syl. Pt. 1, State v. Myers, 171 W.Va. 277, 298 S.E.2d 813 (1982).

V. McLaurin Was Constructively Denied His Right To Counsel And The Effective Assistance Of Counsel When His Trial Attorneys At Sentencing Failed To Say Anything Or Present Any Mitigating Evidence On His Behalf. The Circuit Court Erred In Failing To Address This Habeas Claim.

The Circuit Court Failed To Address This Claim And Make The Required Findings Of Fact And Conclusions Of Law

McLaurin claimed in his supplemental habeas petition that he was denied his right to counsel and the effective assistance of counsel at sentencing because his trial attorneys said and did nothing on his behalf before the trial court imposed nine sentences (seven consecutive terms of 15-25 years on first-degree sexual assault counts (totaling 105-175 years), in addition to the two life without mercy sentences for the C.C. and B.S. kidnappings). In its July 11, 2005, Opinion Order, the circuit court failed to address this claim.

As indicated in the First Assignment of Error, at page 12, W.Va. Code § 53-4A-7(c) requires the circuit court to address each claim for relief and make specific findings of fact and conclusions of law. The circuit court's failure to do so requires the reversal of the court's judgment and a remand to the lower court to make the required findings. Banks v. Trent, 206 W.Va. 255, 257, 523 S.E.2d 846, 848 (1999). State ex. rel. Watson v. Hill, 200 W.Va. 201, 488 S.E.2d 476 (1997). Thus, the habeas court's judgment must be reversed.

This Claim Should Have Been Granted As McLaurin Was Constructively Denied His Right To Counsel And The Effective Assistance of Counsel At Sentencing

McLaurin had a constitutional right to counsel and the effective assistance of counsel at his sentencing since it was a critical stage of the criminal proceedings in his case. Sixth Amendment, U.S. Constitution; Article III, § 14, W.Va. Constitution; Mempa v. Rhay, 389 U.S. 128, 137, 88 S.Ct. 254, 258 (1967); Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205 (1977); State ex rel. Daniel v. Legursky, 195 W.Va. 314, 321, 465 S.E.2d 416, 423 (1995).

In Mempa, the Supreme Court recognized the importance of counsel acting as an advocate for his client:

> . . . the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.

Mempa, 389 U.S. at 135, 88 S.Ct. at 257. In this case, McLaurin had no advocate at sentencing.

The transcript of McLaurin's sentencing reflects that counsel did not say anything on McLaurin's behalf and did not present any mitigating evidence to the trial court:

> THE COURT: * * * This matter comes on for sentencing, the defendant having been found guilty on a prior date by a jury of two counts of kidnapping without a recommendation of mercy and seven counts of sexual assault in the first degree. The matter comes on for sentencing. Mr. Miller, do you or Mr. Earles have anything you wish to say?
>
> MR. MILLER [defense counsel]: Yes, Your Honor. We move that the Court order a sixty day pre-sentencing study prior to pronouncing sentencing on Mr. McLaurin. Other than that, we have nothing to say.
>
> THE COURT: That motion is denied. I have had the benefit of a number of reports. And in keeping with State vs. Alonzo Byrd, I will synopsize those reports for you.
>
> Mr. McLaurin, do you have anything to say.

(Tr. Vol. III 899-900).

The Sixth Amendment required that McLaurin have "'counsel acting in the role of an advocate.'" United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045 (1984) (quoting Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399 (1967)).

> That a person who happens to be a lawyer is present alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (1984). The above record demonstrates McLaurin was denied his right to an effective advocate at sentencing.

When counsel's performance is deficient, a claim of ineffective assistance of counsel is normally governed by the two-pronged test established in Strickland: "(1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have

been different." Syl. Pt. 5, in part, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). However, the United States Supreme Court and this Court both have recognized that counsel is presumed ineffective and a denial of counsel is established when counsel provides no assistance to the defendant.

> 'In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied.' United States v. Decoster, 199 U.S.App.D.C. 359, 382, 624 F.2d 196, 219 (MacKinnon, J., concurring), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979).

Cronic, 466 U.S. at 654 n.11, 104 S.Ct. at 2044 n.11. See Strickland, 466 U.S. at 692, 104 S.Ct. at 2067 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); State ex rel. Daniel, 195 W.Va. at 325, 465 S.E.2d at 427 (under Cronic, a denial of counsel where prejudice is presumed occurs where a defendant "suffered the equivalent of a complete absence of counsel."). As demonstrated above, McLaurin's counsel was effectively absent at his sentencing since counsel provided no assistance to him whatsoever.

In Patrasso v. Nelson, 121 F.3d 297 (5th Cir. 1997), the Fifth Circuit Court of Appeals addressed a Cronic claim in a factual situation identical to this case. In Patrasso, the following colloquy between defense counsel and the court occurred at sentencing:

> Court: Mr. Muldown[ey] [defense counsel]?
> Defense: I have nothing.
> Court: Anything in mitigation?
> Defense: No.
> Court: Nothing.

Id. at 303. On those facts, the Fifth Circuit found "[c]ounsel's performance during sentencing was so lacking that it invites application of Cronic rather than Strickland." Id. at 304.

> 'The Sixth Amendment right to counsel, of course, guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings; an accused is entitled to an attorney who plays a role necessary to ensure that the

proceedings are fair.' United States ex rel. Thomas v. O'Leary, 856 F.2d 1011, 1015 (7th Cir. 1988).

Id. The Court concluded that Patrasso's counsel "effectively abandoned his client at sentencing [,]" . . . "counsel [was] in effect absent, [and] Cronic directs a finding of prejudice." Id. at 305.

Other courts have found a constructive denial of counsel and presumed prejudice where counsel provided no assistance at sentencing. Gardiner v. United States, 679 F.Supp. 1143, 1147 (D. Maine 1988) ("Counsel's failure to speak on his client's behalf at the sentencing procedure and his failure to aid Petitioner in any manner with regard to sentencing constitute a constructive denial of the assistance of counsel altogether in violation of the Sixth Amendment of the United States Constitution and are sufficient to raise a presumption, in all other circumstances, of actual prejudice in sentencing."); Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) ("the failure of Tucker's counsel to provide any assistance was a constructive denial of his right to counsel."). Accord Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997).

Since McLaurin received no assistance from counsel at sentencing, he was constructively denied counsel and prejudice must be presumed. McLaurin was thereby denied his state and federal constitutional rights to counsel and the effective assistance of counsel.

RELIEF REQUESTED

For the foregoing reasons, McLaurin respectfully requests that the order and judgment of the Kanawha County Circuit Court be reversed and his case remanded to the circuit court to grant the petition for writ of habeas corpus and order a new trial. Alternatively, McLaurin requests the Court to remand the case to the circuit court to make findings of fact and conclusions of law on the issues of denial of a competency examination and denial of counsel at sentencing. McLaurin further requests the Court to vacate one of his convictions and sentences for first-degree sexual assault of J.T. by sexual intercourse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on the 2d day of March, 2006, I sent via U.S. Postal Service a copy of the foregoing Appellant's Brief to Barbara Allen, Deputy Attorney General, Attorney General's Office, 1900 Kanawha Boulevard East, Room E-26, Charleston, WV 25305.

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